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Supreme Court, U.S.
FILED

071503 MAY 27 2008

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No. 07-

IN THE
Supreme Court of the United States

HAROLD WILLIAM GUTCH,

Petitioner,

v.

THE FEDERAL REPUBLIC OF GERMANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 27, 2008

QUESTIONS PRESENTED

1. Whether during the occupation of Berlin, German fiscal authorities were prohibited from collecting income taxes from American employees of the American occupation authorities.

2. Whether the Federal Republic of Germany should be held liable for the unlawful collection of income taxes collected by German authorities from an American attorney who was authorized to do legal business in the American sector of Berlin.

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit is reproduced in Appendix A.

The memorandum opinion and order of the United States District Court for the District of Columbia is reproduced in Appendix B.

The order of the United States Court of Appeals for the District of Columbia Circuit denying rehearing is reproduced in Appendix C.

JURISDICTION

The respondent invoked the district court's jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §1602, *et seq.*; the Alien Tort Claims Act, 28 U.S.C. §1350, and general federal question jurisdiction, 28 U.S.C. §1331.

Service of process was made by delivering the complaint and the summons to the Embassy of the Federal Republic of Germany in Washington, D.C.

On March 20, 2008, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to and including May 27, 2008. App. No. 07A787.

STATUTE INVOLVED

The FSIA provides in §1605 for the "General exceptions to the jurisdictional immunity of a foreign state:"

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver. . ."

Here, the Government of the Federal Republic did nothing to stop the illegal collection of income taxes from American nationals who were plainly exempt from the German taxes as long as they worked for the Military Government. Clearly the government of the Federal Republic has waived its immunity by implication by not stopping the unlawful collection of German income taxes from American employees of the Military Government

THE RELEVANT FACTS

Respondent's father, Dr. Kobre, a Harvard-educated lawyer, served in the United States Army during World War II. After Germany's capitulation he settles in the American-occupied sector of Berlin. There he obtained from the American military authorization to act as attorney for military and civilian American personnel in the U.S. area of responsibility in Germany. (App. D, dated 15 August 1950). Less that a year later, attorney Kobre was authorized by an order issued by the Army's European Command to practice law with law offices in Berlin. The order concluded that "the presence of Mr. Samuel L. Kobre in the Areas of Responsibility in Germany is certified to be necessary for purposes of the occupation. (App. E, dated 13 June 1951).

A letter written over a decade later by the Army's Legal Adviser in Europe, Col. James A. Burger, stated in part:

> Mr. Kobre's authorization to practice law in Berlin which is contained in the letter dated 13 June 1951 is a valid document, that is, an official military document. That document was issued by a person acting on behalf of the Commander, Headquarters, United States European Command (HQ USEUCOM) who was and continues to be the highest military authority in Europe.
>
> * * * * *
>
> The only appropriate authority who could have ended the authorization would have been either the Commander HQ USEUCOM or a person at a lower military echelon exercising power on the Commander's behalf.

(App. F, dated 30 Nov 1992).

The German Embassy's representation of Berlin's recent status is not accurate. The decline of the USSR and the end of the Cold War in 1990 allowed for German unification. Berlin, however, did not cease to be an occupied four-power city. It was only in May of 2005 that the Federal Republic signed a peace treaty with the four occupation powers that the occupation of Berlin ended.

Attorney Kobre died in Berlin in November 1989. The German tax authorities, however, did not cease to pursue the assets of the late American attorney. Rather than limit their search to taxable income since

the Berlin occupation terminated, the German tax authorities are now pursuing Mr. Kobre's income that he earned while providing legal services to the American occupation authorities and other American clients at the beginning of the occupation.

As late as March 1995, the Legal Adviser of the Headquarters of the United States European Command, Colonel Raymond Ruppert, confirmed that the status of Attorney Kobre did not change as a result of the coming into force of the so-called "Two-Plus-Four" Treaty concluded earlier by the four occupation Powers and Germany.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 2007

No. 06-7151

HAROLD WILLIAM GUTCH
APPELLANT

v.

FEDERAL REPUBLIC OF GERMANY,
APPELLEE

Appeal from the United States District Court for the District of Columbia (No. 05cv02338)

Filed On: October 31, 2007
Mandate Issued: February 1, 2008

BEFORE: GRIFFITH, *Circuit Judge*, and EDWARDS and WILLIAMS, *Senior Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of the parties. It is

ORDERED AND ADJUDGED that the district court's order granting defendant's motion to dismiss

and denying plaintiff's motion for leave to perfect service of process is affirmed.

Harold Gutch has filed suit in federal district court against the Federal Republic of Germany. Gutch's suit challenges tax assessments levied by Germany against his deceased father, Dr. Samuel L. Kobre. German courts have upheld a judgment against Dr. Kobre for his failure to pay taxes to Germany from 1957 to 1989. Upon Dr. Kobre's death in 1989, the judgment passed to his son Gutch as inheritance debt. In his complaint, Gutch argues that his father was immune from German tax liability because he was a member of the Allied Forces in Berlin from 1951 until his death. Gutch asks the district court to declare the German judgment null and void, and to award damages.

As a foreign sovereign, Germany is immune from suit in the United States unless one of the exceptions to the Foreign Sovereign Immunities Act ("FSIA") applies. 28 U.S.C. § 1604; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989). On appeal, Gutch relies upon two exceptions, neither of which applies to his suit. Sovereign immunity under FSIA is "[s]ubject to existing international agreements to which the United States [was] a party at the time of the enactment of [the] Act." 28 U.S.C. § 1604. But these international agreements eliminate sovereign immunity only where they "expressly conflic[t] with the immunity provisions of FSIA." *Amerada Hess,* 488 U.S. at 442 (internal quotation marks omitted; alteration in original). No such international agreements apply to Germany. None of the agreements that Gutch lists in his complaint contain any mention of sovereign immunity,

nor do they create an express conflict with the immunity provisions of FSIA.

FSIA also provides jurisdiction where "the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Gutch argues that Germany's surrender at the end of World War II was an explicit waiver of sovereign immunity, but "[a] foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002). Germany's unconditional surrender made no mention of waiver of German sovereign immunity in the courts of the United States. We have found an implicit waiver of sovereign immunity in only three situations, and Gutch has failed to allege facts that would implicate any of them. *Id.* at 1161-62 n.11 ("Courts have found implied waiver where a foreign state has filed a responsive pleading without raising the defense of sovereign immunity . . . [and] where the state has agreed to arbitrate or to adopt a particular choice of law . . . .").

Because the district court lacked subject matter jurisdiction over Gutch's claims, it properly denied his motion for leave to perfect service of process.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail

Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 05-2338 (RMU)
Document Nos.: 5, 7

HAROLD WILLIAM GUTCH,

Plaintiff,

v.

FEDERAL REPUBLIC OF GERMANY,

Defendant.

MEMORANDUM OPINION

Granting the Defendant's Motion to Dismiss and Denying the Plaintiff's Motion for Leave to Perfect Service of Process

I. INTRODUCTION

The *pro se* plaintiff, a dual U.S. and German citizen, brings suit challenging tax assessments levied by the defendant against the plaintiff's deceased father. The plaintiff claims that his father was immune from German taxation as a member of the Allied Forces of Berlin from 1957 to 1989. Before the court are the defendant's motion to dismiss and the plaintiff's motion for leave to perfect service of process.[1] Because the court lacks subject-matter

[1] The plaintiff also moves for a court-appointed counsel. Pl.'s Mot. to Am./Correct and to Appoint Counsel. Because the court dismisses the plaintiff's complaint for lack of jurisdiction, it denies plaintiff's motion for counsel as moot.

jurisdiction over the plaintiff's claims, the court grants the defendant's motion to dismiss. Consequently, because granting the plaintiff leave to perfect service would be futile, the court denies the plaintiff's motion to perfect service of process

II. BACKGROUND

A. Factual History

The plaintiff's father, Dr. Samuel L. Kobre, began practicing law in Berlin in 1950. Compl. ¶ 95. In 1951, during the Allied Forces occupation of Germany, Kobre, became a member of the Allied Forces of Berlin. *Id.* ¶¶ 95-98. As a member of the Allied Forces, according to the plaintiff, Kobre was immune from taxation in Germany. *Id.* ¶ 98. Between 1955 and 1957, however, Kobre received three letters informing him that his status as a member of the Allied Forces had terminated. *Id.* ¶ 115. But the plaintiff alleges that the letters Kobre received were insufficient to end his special status and terminate his immunity from the defendant's jurisdiction. *Id.* ¶¶ 115-23. Moreover, the plaintiff maintains that Kobre's status as a member of the Allied Forces did not automatically terminate in 1955 when the occupation of West Germany ended, *id.*, and that Kobre continued to enjoy immunity from German jurisdiction and taxation, *id.* ¶ 133.

The plaintiff alleges that German authorities tried Kobre in a German criminal court for tax evasion for the period from 1957 to 1987, and the court concluded that because his status as a member of the Allied Forces had ended, he was not immune from taxation or jurisdiction in German courts. *Id.* ¶¶ 124-29. The court

allegedly found Kobre guilty of tax evasion on February 23, 1989. *Id.* ¶ 129, p. 107.[2] In 1987, German revenue authorities filed a parallel civil suite concerning the tax assessments from 1957 to 1987, and in 1989, they initiated another suit involving assessments for the years 1988 through 1989. *Id.* ¶ 128, p. 108. Kobre died before the case was resolved, and the assessments passed to the plaintiff as inheritance debt. *Id.*.

The plaintiff brought a civil suit to challenge the tax assessments. *Id.* ¶ 129, p.108. The civil court also ruled against the plaintiff, concluding that Kobre's special status ended in 1955. *Id.* ¶¶ 130-134, p. 109-115. The German Federal Fiscal Court, the appellate court in Germany, dismissed the plaintiffs subsequent appeal in 1994 as unfounded, and the German Constitutional Court, the court of last resort, elected not to hear the case in 1996. *Id.* ¶¶ 141, 143. In 1999, the European Commission on Human Rights rejected the plaintiffs appeal. *Id.* ¶ 143.

B. Procedural History

On December 7, 2005, the plaintiff brought this action, claiming that his debt to the defendant is invalid because his father was a member of the Allied Forces of Berlin from 1951 until his death, and he was consequently immune from German jurisdiction and taxation. *See* Compl. He asserts that the court has jurisdiction over this case based on the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330

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[2] The complaint has two paragraphs numbered 128 and two paragraphs numbered 129, so the court will identify these paragraphs with a page number in addition to a paragraph number.

et seq., the Alien Tort Claims Act ("ATCA"), 28 U.S.C. §§ 1350 *et seq.*, and federal question jurisdiction, 28 U.S.C. § 1331. *Id.* ¶ 4.

On December 7, 2005, the plaintiff attempted to serve the defendant by mailing the complaint and summons to the Embassy of the Federal Republic of Germany in Washington, D.C. Def.'s Mot. at 1; Not. of Mailing of Compl. at 2. On January 3, 2006, the defendant moved the court to dismiss the plaintiff's complaint for lack of proper service of process and for lack of personal jurisdiction. The plaintiff opposes the defendant's motion to dismiss and moves for leave to perfect service. The court first turns to the defendant's motion.

III. ANALYSIS

A. The Court Grants the Defendant's Motion to Dismiss

The defendant moves the court to dismiss the complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) and because service was improper. Def.'s Mot. at 4. The plaintiff responds to the motion by asking the court for leave to perfect service. Pl.' s Mot. at 4. In order to establish personal jurisdiction under the FSIA, a plaintiff must demonstrate subject-matter jurisdiction and proper service of process. *Transaero, Inc.*, v. *LaFuerza Aerea Boliviana*, 30 F.3d 148,151 (D.C. Cir. 1994) (citing *Tex. Trading & Milling Corp.* v. *Fed. Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981)). Because the court lacks subject-matter jurisdiction over the plaintiff's claims, it dismisses the complaint for lack of personal

jurisdiction, and it denies the plaintiff's motion to perfect service.

1. Legal Standard for a Motion to Dismiss Pursuant to Rule 12(b)(1)

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 288-89 (1938); *see also Gen. Motors Corp.* v. *Envtl. Proto Agency*, 363 F.3d 442,448 (D.C. Cir. 2004) (noting that "[a]s a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction").

Because "subject-matter jurisdiction is an 'Art. III as well as a statutory requirement[,] no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Akinseye* v. *District of Columbia*, 339 F.3d 970,971 (D.C. Cir. 2003) (quoting *Ins. Corp. of Ir., Ltd.* v. *Compagnie des Bauxite de Guinea*, 456 U.S. 694, 702 (1982)). On a motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(l), the plaintiff bears the burden of establishing that the court has subject-matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555,561 (1992). The court may dismiss a complaint for lack of subject-matter jurisdiction only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Empagan S.A. v. F. Hoffman-Laroche, Ltd.*, 315 F.3d 338, 343 (D.C. Cir. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *vacated on other grounds*, 542 U.S. 155 (2004).

Because subject-matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States,* 334 F.3d 61, 64, 69 (D.C. Cir. 2003); *Grand Lodge of Fraternal Order of Police v. Ashcroft,* 185 F. Supp. 2d 9, 13 (D.D.C. 2001). Moreover, the court is not limited to the allegations contained in the complaint. *Hohri v. United States,* 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds,* 482 U.S. 64 (1987). Instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Scis.,* 974 F.2d 192, 197 (D.C. Cir. 1992).

2. Legal Standard for the Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act is "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 434 (1989). The basic premise of the FSIA is that foreign sovereigns are immune from suit in the United States unless the action falls under one of the specific exceptions enumerated in the statute. 28 U.S.C. § 1604; *Price v. Socialist People's Libyan Arab Jamahiriya,* 389 F .3d 192, 196 (D.C. Cir. 2004). If a foreign sovereign is not immune, the federal district courts have exclusive jurisdiction over the action. 28 U.S.C. §§ 1330, 1604; *Daliberti v. Republic of Iraq,* 97 F. Supp. 2d 38, 42 (D.D.C. 2000) (citing *Amerada Hess,* 488 U.S. at 434-35).

Under the FSIA, a foreign sovereign has "immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." *Phoenix Consulting, Inc. v. Republic of Angola,* 216 F.3d 36, 39 (D.C. Cir. 2000) (quoting *Foremost-McKesson, Inc. v. Islamic Republic of Iran,* 905 F.2d 438, 443 (D.C. Cir. 1990)). The special circumstances of a foreign sovereign require the court to engage in more than the usual pretrial factual and legal determinations. *Foremost-McKesson,* 905 F.2d at 449. The D.C. Circuit has noted that it is particularly important that the court "satisfy itself of its authority to hear the case" before trial. *Id.* (quoting *Prakash v. Am. Univ.,* 727 F.2d 1174, 1179 (D.C. Cir. 1984)).

3.The Defendant is Entitled to Sovereign Immunity

At the outset, the court notes that the parties do not dispute that the defendant is a sovereign. Pl.'s Compl. ¶ 7 (stating that "[t]he defendant, the Federal Republic of Germany (Germany), is a foreign state" and that the FSIA governs the plaintiff's claims); Def.'s Mot. at 1 (challenging the plaintiff's service of process as failing to comply with the permissible methods of service properly "effected on a foreign sovereign"). As a result, the plaintiff bears the burden to establish that one of the FSIA exceptions applies and allows his claims to proceed. *Virtual Countries, Inc. v. Republic of South Africa,* 300 F.3d 230, 241-42 (2d Cir. 2002).

The plaintiff claims that the court may exercise jurisdiction over the defendant because the case falls within several exceptions to the FSIA.[3] First, the

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[3] The plaintiff also maintains that the court has jurisdiction over the defendant under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. §§

plaintiff asserts that his claims are subject to international agreements. Compl. ¶ 8. Second, he claims that the defendant waived its sovereign immunity when it surrendered to the Allied Forces at the end of World War ll. *Id.* ¶ 9. Third, the plaintiff states that the expropriation exception applies. *Id.* ¶ 31. Fourth, he argues that his claims fall within the immovable property exception. *Id.* ¶ 32. Finally, he claims that the tortious activity exception permits this suit to proceed. *Id.* ¶¶ 52-55. The defendant challenges the legal sufficiency of the court's jurisdiction, and the court will, therefore, scrutinize the plaintiff's factual allegations to determine whether they, if true, bring the case within the FSIA's exceptions. *Kilburn* v. *Socialist People's Libyan Arab Jamahiriya,* 376 F .3d

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1350 *et seq*. Compl.¶6. But in a suit against a foreign state, a plaintiff must establish that the court has subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA "), 28 U.S.C. §§ 1330 *et seq.*, before a court will consider whether or not the ATCA is applicable. *Soudavar v. Islamic Republic of Iran,* 67 Fed. Appx. 618, 619-20 (D.C. Cir. 2003); *see also Saltany v. Reagan,* 886 F.2d 438, 440-41 (D.C. Cir. 1989). Because the court finds that the plaintiff's claims do not confer subject-matter jurisdiction under the FSIA, the court will not consider the plaintiff's ATCA claims.

The plaintiff further alleges that the court has jurisdiction under federal question jurisdiction. Compl. ¶ 6. The plaintiff misunderstands federal question jurisdiction. Federal question jurisdiction does not provide an independent cause of action. Rather, it is the principle that confers jurisdiction on federal courts to hear claims involving federal statutes. *Merrell Dow Pharm., Inc. v. Thompson,* 478 U.S. 804 (1986). A plaintiff must still bring claims pursuant to a federal statute, as the plaintiff does here. Federal question jurisdiction, therefore, is not an independent grounds for jurisdiction. Because the plaintiff has not established jurisdiction under the FSIA, his claims fail to allege a federal question conferring jurisdiction.

1123, 1127 (D.C. Cir. 2004). Because the plaintiff's allegations do not fall under the exceptions to the FSIA, the defendant is entitled to sovereign immunity. Accordingly, the court dismisses the plaintiff's claims.

c. The Plaintiff's Claims are Not Subject to Existing International Agreements

The plaintiff argues that Germany's sovereign immunity in this case is subject to existing international agreements. Compl. ¶ 8. The plaintiff asserts that because the courts in Germany applied the NATO Status of Forces Agreement ("NATO-SOFA") to his claims, and because the United States was a member of several international agreements during the Allied Forces occupation from 1945 until 1990, there are "international agreements governing this case."[4] *Id.*

A "foreign sovereign's immunity from suit is 'subject to existing international agreements to which the United States [was] a party at the time of the

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[4] The plaintiff also attaches a photocopy listing of international agreements pertaining to the Allied occupation of Berlin. Compl. ¶ 11-27; Ex. 17. The plaintiff, however, bears a burden to argue the applicability of the FSIA exceptions to his claims. *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241-42 (2d Cir. 2002). Merely citing international agreements fails to meet this burden. Because the plaintiff provides no argument that a direct conflict exists between these agreements and the immunity provisions of the FSIA, the court will not analyze their applicability to the plaintiff's claims. *See Shafi v. Flowers-Hinnant*, 2006 U.S. Dist. LEXIS 41469, *6 (D.D.C. June 21, 2006) (stating that although a court ought to liberally construe a *pro se* litigant's pleadings, *pro se* litigants must comply with the Federal Rules of Civil Procedure, including meeting their burden to show that the court has jurisdiction) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Jarrell v. Tisch*, 656 F. Supp. 237, 239 (D.D.C. 1987)).

enactment of [the FSIA].'" *Princz* v. *Fed. Republic of Germany,* 26 F.3d 1166, 1175 (1994) (quoting 28 U.S.C. § 1604). Stated differently, for the plaintiff to successfully assert the existing agreement exception, a direct conflict must exist between a preexisting international agreement and the immunity provisions of the FSIA. *Moore* v. *United Kingdom,* 384 F.3d 1079, 1085 (9th Cir. 2004).

The plaintiff claims that Article X of the NA TO-SOFA governs his claims and waives the defendant's immunity. *Id.* ¶ 33. Indeed, "[t]he NATO-SOFA predated the FSIA, and is therefore one of the 'existing international agreements' covered by the caveat in § 1604." *Moore,* 384 F.3d at 1065. For this international agreement to permit the plaintiff to proceed with his claims, however, the provision must expressly conflict with the immunity provisions of the FSIA. Article X of the NATO-SOFA provides, *inter alia,* that "[m]embers of a force or civilian component shall be exempt from taxation in the receiving State[5] . . ." NATO Status of Forces Agreement art. X, June 19, 1951, 4 U.S.T. 1792. Article X sets forth conditions under which members of the Allied Forces reside in Germany, but it makes no mention of Germany's immunity from suit. Therefore, the court fails to see how the NATO-SOFA abrogates the defendant's immunity and creates a private cause of action. *See Amerada Hess,* 488 U.S. at 442 (stating that the international agreement exception applies when "international agreements

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[5] A "receiving state" is "the Contracting party in the territory of which the force or civilian component is located, whether it be stationed there or passing in transit." NATO Status of Forces Agreement art. 1, June 19, 2005,4 U.S.T. 1792.

'expressly conflic[t]' with the immunity provisions of the FSIA," to create a private cause of action) (internal citations omitted).

In the same way, the plaintiff references Allied treaties and agreements concerning the governance of Germany, and he asserts that "Allied laws in Berlin are also 'international agreements' governing the FSIA." Compl. ¶ 28. The plaintiff, however, fails to show how these agreements conflict with the immunity provisions ofthc FSIA and defeat the defendant's immunity. Absent an express conflict between the FSIA and the agreements the plaintiff cites, the existing agreement exception is inapplicable to the plaintiff's claims. *Moore,* 384 F .3d at 1085.

b. The Defendant has Not Waived Sovereign Immunity

Additionally, the plaintiff argues that the case falls under the waiver exception to the FSIA. The plaintiff alleges that the defendant explicitly waived sovereign immunity by unconditionally surrendering to the Allies in 1945 at the end of World War II. Compl. ¶ 9. Moreover, because the Allies controlled Berlin until 1990, the plaintiff argues that Germany's waiver of sovereignty extended until 1990. *Id.*

The FSIA states that "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Although a sovereign can waive its immunity either explicitly or implicitly, courts generally require a waiver of sovereignty to be explicit. *See In re Terrorist Attacks*

on Sept. 11, 2001, 349 F. Supp. 2d 765, 803 n.31 (S.D.N.Y. 2005) (*citing Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255,261 (2d Cir. 2003)). An explicit waiver *of* sovereign immunity "must be an intentional and knowing relinquishment of the legal right." *Walker Int'l Holdings Ltd. v. Republic of Congo,* 395 F.3d 229, 234 (5th Cir. 2004) (quoting *Good v. Aramco Services Co.,* 971 F. Supp. 254, 261 (S.D. Tex. 1997)). Moreover, "explicit waivers of immunity are narrowly construed 'in favor of the sovereign' and are not enlarged 'beyond what the language requires." *World Wide Minerals, LTD v. Republic of Kazakhstan,* 296 F.3d 1154, 1162 (D.C. Cir. 2002) (quoting *Library of Cong. v. Shaw,* 478 U.S. 310, 318 (1986)).

The plaintiff alleges that the defendant's unconditional surrender to the Allies acted to forfeit its status as a sovereign, and, as a result, waive its sovereign immunity. Compl. ¶ 9. The plaintiff cites no case law in support of his position, and the court's own efforts to find applicable law are unavailing. In applying the FSIA the court is to assume immunity, and when ambiguity exists, it ought to find in favor of immunity. *World Wide Minerals,* 296 F.3d at 1163 (concluding that Kazakhstan was entitled to immunity where provisions of an agreement created ambiguity). Although the defendant's surrender was, indeed, unconditional, Military Surrender by Germany, May 8, 1945, 1945 U.S.T. Lexis 194 *1, the court cannot conclude that Germany's surrender "evinces a clear and unambiguous intent" to subject itself to legal proceedings. *Libra Bank, Ltd. v. Banco Nacional de Costa Rica,* 676 F.2d 47, 49 (2d Cir. 1982). Consequently, the court concludes that the plaintiff's

bare allegations fail to establish that this exception applies. *Kilburn,* 376 F.3d at 1127.

When a sovereign does not expressly waive immunity, a court may nevertheless recognize an implicit waiver of immunity in certain circumstances. Courts narrowly interpret implicit waivers of sovereign immunity. *Calzadilla v. Banco Latino Int'l,* 413 F.3d 1285, 1287-88 (D.C. Cir. 2005); *Shapiro v. Republic of Bolivia,* 930 F.2d 1013, 1017 (2d Cir. 1991). "[A]n implied waiver [of sovereign immunity] depends upon the... government's having at some point indicated its amenability to suit." *Princz,* 26 F .3d at 1174 (holding that the violation of *jus cogens* norms by defendant Germany did not constitute an implied waiver of Germany's sovereign immunity under the FSIA); *see also Frolova v. Union of Soviet Socialist Republics,* 761 F.2d 370,377 (7th Cir. 1985) (noting that courts "rarely find that a nation has waived its sovereign immunity . . . without strong evidence that this is what the foreign state intended"). An implicit waiver can exist in three situations: "1) when a foreign state agrees to arbitration in another country; 2) when a foreign state agrees that the laws of another country govern a contract; and 3) when a foreign state files a responsive pleading without raising the immunity defense." *Pere v. Nuovo Pignone, Inc.,* 150 F.3d 477,482 (5th Cir. 1998) (citing H. Rep. No. 1487, 94th Cong., 2nd Sess. 18, *reprinted in* 1976, U.S.C.C.A.N. 6604, 6617). Courts are reluctant to recognize other acts as constituting an implicit waiver. *World Wide Minerals,* 296 F.3dat 1161 n.11 *(quoting Princz,* 26 F.3d at 1174).

The third example of implied waiver is the only exception at play because the plaintiff has not argued that the defendant agreed to arbitration in the United States or that U.S. law applies to a contract. The defendant has entered an appearance and filed a motion to dismiss for lack of personal jurisdiction. A motion to dismiss, however, is not a responsive pleading for the purpose of this exception. *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277 (2d Cir. 1984) (refusing "to hold that the filing of a variety of motions, including a motion to dismiss, automatically waives the defense" of sovereign immunity). Therefore, the plaintiff cannot maintain his claims on this theory.

c. The Plaintiff's Claims do Not Fall Under the Expropriation Exception

The plaintiff claims that the taxes levied by the defendant against the plaintiff's father include assessments against his income from U.S. stocks. Compl. ¶ 31. The plaintiff further alleges that the defendant seized the entire estate of his deceased father, including bank assets, which is "property present in the United States." *Id.* ¶ 32. Section 1605(a)(3) states that a foreign state will not be immune to jurisdiction in a case:

> in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an

> agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]

28 U.S.C. § 1605(a)(3). This provision is known as the "expropriation exception." *Nemariam v. Fed. Democratic Republic of Ethiopia,* 400 F. Supp. 2d 76, 81 (D.D.C. 2005).

Most courts maintain that the expropriation exception applies only when the property at issue is "tangible." *Nemarium,* 400 F. Supp. at 81-82 (citing *Peterson v. Royal Kingdom of Saudi Arabia,* 332 F. Supp. 2d 189, 197 (D.D.C. 2004)). Intangible property which fails to fall within this exception includes "bank accounts, stock options, and business good-will." *Nemarium,* 400 F. Supp. at 83 (quoting Black's Law Dictionary 1233 (7th ed. 1999)). Bank accounts in the U.S. are not tangible property because "the holder [of a bank account] simply has a contractual right to receive the funds upon request, not physical possession or even control of the actual funds." *Id.* Although stocks themselves are not tangible property, the subject of a foreign government's seizure of a "controlling interest in the stock of a company" constitutes tangible property under § 1605(a)(3) because it is the equivalent to control over the assets and profits of the company. *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia,* 616 F. Supp. 660, 663 (W.D. Mich. 1985).[6]

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[6] The Court of Appeals for the District of Columbia Circuit has not determined the bearing of the tangible/intangible property distinction on the court's subject-matter jurisdiction. *Peterson v. Royal Kingdom of Saudi Arabia,* 416 F.3d 83, 88 (D.C. Cir. 2005).

First, the plaintiff alleges that the defendant wrongfully seized the plaintiff's father's bank accounts. Compl. ¶ 31. Because bank accounts are not tangible property, however, this exception does not apply to those claims. *Nemarium,* 400 F. Supp at 83. Second, the plaintiff argues that the defendant seized U.S. stocks. Compl. ¶ 31. In order for the plaintiff to maintain this claim, he must argue that the stocks are tangible property. The plaintiff, however, fails to make that argument. Indeed, the plaintiff does not allege either that this stock was a controlling share of a company (pursuant to *Kalamazoo Spice)* or that it otherwise constitutes tangible property. Without asserting more than the mere seizure of U.S. stock, the plaintiff fails to allege facts sufficient for the expropriation exception to apply.[7] *Peterson,* 332 F. Supp. 2d at 197 (stating that courts have held that the expropriation exception "only applies where the property at issue as 'tangible property'") (citing *Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi,* 1996 U.S. Dist. LEXIS 10430; *Lord Day and Lord v.*

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[7] The court holds *pro se* litigants' pleadings "to less stringent standards than formal pleadings drafted by lawyers," *Thomas v. Principi*, 394 F.3d 970, 974 (D.C. Cir. 2005) (quoting *Haines v. Kerner,* 404 U.S. 519, 520 (1972)), and it gives the plaintiff the benefit of all inferences reasonably drawn from the complaint, *Settles v. United States Parole Comm'n,* 429 F.3d 1098, 1107 (D.C. Cir. 2005). Even viewing the plaintiff's allegations through that lense, however, the court cannot conclude that the plaintiff has established that the seized stocks constitute tangible property and, consequently, that the expropriation exception applies. *Shaft v. Flowers-Hinnant,* 2006 U.S. Dist. LEXIS 41469 *6 (D.D.C. June 21, 2006) (dismissing a *pro se* litigant's claims for failure to establish the court's jurisdiction and explaining that "a *pro se* litigant, like any other litigant, must comply with the Federal Rules of Civil Procedure). Accordingly, the court must conclude that it lacks jurisdiction over the plaintiff's claims.

Socialist Republic of Vietnam, 134 F. Supp. 2d 549, 560 (S.D.N.Y. 2001); *Leutwyler v. Office of Her Magesty Queen Rania al Abdullah,* 184 F. Supp. 2d 277, 289 n.13 (S.D.N.Y. 2001); *Hirsh* v. *State of Israel,* 962 F. Supp. 377, 383 (S.D.N.Y. 1997); *Intercontinental Dictionary Series v. De Gruyter,* 822 F. Supp. 662, 678 (C.D. Ca. 1993)).

d. The Plaintiff's Claims do Not Fall Under the Immovable Property Exception

The plaintiff claims that the disputed property also brings the case under § 1605(a)(4) of the FSIA. Compl ¶ 31. Section 1605(a)(4) of the FSIA says that a foreign state will not be immune if "rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). "[I]mmovable property situated in the United States," however, refers to real estate located in this country. *City of New York v. Permanent Mission of India to the United Nations,* 446 F.3d 365, 369 (2d Cir. 2006) (explaining that the language of the provision restricts its application to cases in which rights to real estate located within the United States are in issue). The property at issue here consists of bank accounts and stocks, and the plaintiff makes no allegations regarding real estate. Compl. ¶¶ 31-32. Therefore, the immovable property exception does not apply, and sovereign immunity bars the plaintiff's claims.

e. The Plaintiff's Claims do Not Fall Under the Tortious Activity Exception

Finally, the plaintiff argues that the defendant's taking of his father's property was unlawful, and brings the case under the tortious activity exception of the FSIA. Compl. ¶ 31. A foreign state is generally not immune if "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state." 28 U.S.C. § 1605(a)(5). This exception seeks "to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law." *Amerada Hess,* 488 U.S. at 439 (citations omitted); see also *MacArthur Area Citizens Ass'n v. Republic of Peru,* 809 F.2d 918, 921 (D.C. Cir. 1987) (explaining that this exception applies to allegations of tort and should be narrowly construed "not to encompass the farthest reaches of common law"). In addition, both the tortious act and the injury must occur in the United States for this exception to apply. *Frolova,* 761 F.2d at 379.

The plaintiff alleges that the defendant's seizure of his assets was, and continues to be, tortious, causing him emotional distress. Compl. ¶¶ 52-55. The basis for his claims, however, is that "property [was] taken in violation of international law." Compl. ¶ 31. Courts maintain that even when a claim sounds in tort, the tortious activity exception does not apply when the claim "is essentially a claim for an unjust taking of property." *De Sanchez v. Banco Central De Nicaragua,* 770 F.2d 1385, 1398 (5th Cir. 1985); *see also Chuidian*

v. Philippine Nat. Bank, 912 F .2d 1095, 1106 (9th Cir. 1990) (explaining that allowing plaintiff's to re-characterize their property claims as tortious would enable them to wrongfully escape the requirements of § 1605(a)(3)). The plaintiff's allegations all involve the defendant wrongfully confiscating the plaintiff's assets. Consequently, the tortious activity exception does not apply.

In sum, none of the FSIA's exceptions are available to the plaintiff, and the defendant's immunity bars the plaintiff's claims. The court now turns to the plaintiff's motion to perfect service of process.

B. The Court Denies the Plaintiff's Motion for Leave to Perfect Service

The defendant claims that the plaintiff's service does not comply with the methods of service required by the FSIA. Def.'s Mot. at 1. The plaintiff acknowledges that his attempted service of process was improper according to 28 U.S..C. § 1608, and he requests leave to perfect service. Pl.'s Mot. ¶ 5.

Pro se litigants are allowed greater latitude than litigants who are represented by counsel to correct improper service of process. *See Moore* v. *Agency for Int'l. Dev.,* 994 F.2d 874, 876 (D.C. Cir. 1993); *Haines* v. *Kerner,* 404 U.S. 519, 520 (1972) (stating that *pro se* litigants are held to "less stringent standards than formal pleadings drafted by lawyers"); *See also Hilska v. Jones,* 297 F. Supp. 2d 82, 90 (D.D.C. 2003) (granting a *pro se* plaintiff 15 months to correct improper service because of the plaintiff's *pro se* status and because the plaintiff lived overseas). Although the court has discretion to grant the plaintiff leave to

perfect service of process, Fed. R. Civ. P. 4(m), the court need not exercise its discretion when an alternative ground for dismissal exists, *Sullivan* v. *Potter,* 2006 WL 785289, slip op. *3 (D.D.C. Mar. 28, 2006). Because the court lacks subject-matter jurisdiction over the plaintiff's claims, it declines to grant the plaintiff leave to perfect service.

IV. CONCLUSION

For the foregoing reasons, the court grants the defendant's motion to dismiss and denies the plaintiff's motion for leave to perfect service of process. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 27th day of July, 2006.

RICARDO M. URBINA

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 05-2338 (RMU)
Document Nos.: 5, 7

HAROLD WILLIAM GUTCH,

Plaintiff,

v.

FEDERAL REPUBLIC OF GERMANY,

Defendant.

ORDER

Granting the Defendant's Motion to Dismiss and Denying the Plaintiff's Motion for Leave to Perfect Service of Process

For the reasons stated in this court's memorandum opinion separately and contemporaneously issued this 27th day of July 2006, it is hereby

ORDERED that the defendant's motion to dismiss is **GRANTED**, and it is

FURTHER ORDERED that the plaintiff's motion for leave to perfect service of process is **DENIED**.

SO ORDERED.

RICARDO M. URBINA

United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 2007

No. 06-7151

Harold William Gutch
Appellant

v.

Federal Republic of Germany,
Appellee

Filed On: January 18, 2008

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Edwards and Williams, Senior Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, the supplement thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail

Michael C. McGrail
Deputy Clerk

APPENDIX D

HEADQUARTERS
EUROPEAN COMMAND

AG 250.44 JAG — APO403
15 AUG 1950

SUBJECT: Authorization to Act as Attorney for Occupation Personnel in the US Areas of Responsibility in Germany

TO: All Military Commanders and To Whom It May Concern

1. Mr. Samuel L. Kobre is hereby authorized to act as attorney for occupation personnel with law office at Berlin, Germany, pursuant to and in accordance with the provisions of Circular 228, Headquarters, European Command.

2. All Commanders are directed to provide him while in the United States Area of Responsibility in Germany, with the military assistance and facilities contemplated by the said circular.

BY COMMAND OF GENERAL HANDY

/s/ [signature illegible]

1 incl
Cir 228, Hq, EUCOM

Telephone: Heidelberg 8879

COPIES TO: Secretary, Attorney's Supervisory Board, Court of Appeals, US Courts of the Allied High Commission for Germany, APO 696, US Army

CO, Berlin Military Post
APO 742, US Army

APPENDIX E

HEADQUARTERS
EUROPEAN COMMAND

AG 250.44 JAG — APO403
13 JUN 1951

SUBJECT: Authorization to Practice Law in the US Areas of Responsibility in Germany

TO: All Military Commanders Whom it May Concern

1. Mr. Samuel L. Kobre is hereby authorized to practice law with law offices in Berlin, Germany, pursuant to and in accordance with all the provisions of EUCOM Letter, AG 250.4 JAG-APO, 16 October 1950, subject: "Practice of Law by US Lawyers in the US Areas of Responsibility Germany", as amended (copy attached).

2. The presence of Mr. Samuel L. Kobre in the US Areas of Responsibility in Germany is certified to be necessary for the purposes of the occupation.

3. All commanders are directed to provide him, while in the US Areas of Responsibility in Germany, with the logistical support authorized to civilian attorneys as set forth in EUCOM Circular 2, 1950.

BY COMMAND OF GENERAL HANDY

/s/ Andrew Cella
ANDREW CELLA
Lt. Col AGO

1 incl
EUCOM Ltr, AG 250.4 JAG-AGO,
15 Oct 50, as amended

Copy to CO, BMP

APPENDIX F

HEADQUARTERS
UNITED STATES EUROPEAN COMMAND
APO AE 09128-4209

IN REPLY REFER TO
ECLA 30 November 1992

Dr. Ulrike Gutch
Isarstrasse 66
8400 Regenburg

Dear Dr. Gutch,

Reference is made to your letter of November 18, 1992, requesting answers to questions raised concerning the authority granted by HQ USEUCOM to Mr. Kobre to practice law, the procedure for withdrawal of that authority, and the appointment for an indefinite term.

Mr. Kobre's authorization to practice law in Berlin which is contained in the letter dated 13 Jun 1951 is a valid document, that is, an official military document. That document was issued by a person acting on behalf of the Commander, Headquarters, United States European Command (HQ USEUCOM) who was and continues to be the highest military authority in Europe.

The authorization was to practice law for the duration of the occupation which ended in Berlin a little over two years ago. It could also have been withdrawn earlier by action taken by the appropriate authority to end it.

The only appropriate authority who could have ended the authorization would have been either the Commander HQ USECOM or a person at a lower military echelon exercising power on the Commander's behalf.

To the best of our knowledge, the authorization was not terminated prior to the ending of the occupation.

Sincerely,

/s/ James Burger

JAMES A. BURGER
Colonel, USA
Legal Adviser

APPENDIX G

HEADQUARTERS
UNITED STATES EUROPEAN COMMAND
UNIT 30400, APO AE 09128

REFER TO
ATTENTION OF
ECLA 20 MAR 95

Dr. Ulrike Gutch
Isarstrasse 66
8400 Regenburg

Dear Dr. Gutch,

Reference is made to your letters of 9 February and 2 March 1995 which raise a number of further questions concerning Mr. Kobre's status on and after 1955.

For the same reasons mentioned in our letter of 23 February 1995, the status granted in paragraph 2 of the letter dated 13 June 1951 by command of the Commander, Headquarters, United States European Command could not be withdrawn by the letters of 22 June and 8 July 1955 and 29 May 1957. It is also correct that the status granted in paragraph 2 of the letter dated 13 June 1951 did not, by its own terms expire in 1955.

You requested that we looked at Allied Kommandatura Law No. 7, Article 3, paragraph 2., and Article 4, paragraph 1., in conjunction with the "Two-Plus-Four" Treaty. Specifically, you ask if the power to decide on Allied matters was passed onto the Germans in that Treaty. You ask further who would decide on such an issue.

The "Two-Plus-Four" Treaty is a diplomatic agreement which was negotiated by representatives from our State Department rather than by military representatives. Hence, questions about that Treaty should be address to the Legal Advisor's Office at the U.S. State Department. The same is true with respect to questions of interpretation of the Allied Kommandatura Law no. 7. You refer in your 2 March 1995 letter to the memorandum dated April 24, 1957 written by the U.S. Embassy, Bonn, Legal Advisor, Mr. Waldstein. He did discuss in that memorandum some pertinent aspects of these issues.

/s/ Raymond C. Ruppert

RAYMOND C. RUPPERT
COL, USA
Legal Advisor

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(2)

FILED
JUL 1 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1503

In The
Supreme Court of the United States

HAROLD WILLIAM GUTCH,
Petitioner,

v.

FEDERAL REPUBLIC OF GERMANY,
a Foreign State,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

JEFFREY HARRIS
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July 1, 2008

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QUESTIONS PRESENTED

1. Whether the Federal Republic of Germany's prosecution in Germany of an American citizen and German resident practicing law in Germany for failure to pay income tax, and Germany's subsequent collection of said taxes in Germany, constitutes an implied waiver of sovereign immunity pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(1).

2. Whether petitioner has failed to show a true conflict among the various circuits on the standard for finding a waiver of sovereign immunity by implication, especially where any conflict would be immaterial to the outcome of the case because the Federal Republic of Germany was never properly served as is required by the Foreign Sovereign Immunities Act.

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STATEMENT OF THE CASE

I. Procedural Background

Petitioner Harold William Gutch, is a German resident, with dual German and United States citizenship. (Pet. App. B, p. 5a).[1] He filed an action in the district court for the District of Columbia against the Federal Republic of Germany seeking return of German income taxes levied in Germany against his deceased father by German tax authorities for legal work performed in Germany by petitioner's father who was a U.S. citizen and resident of Germany. Respondent moved to dismiss the case arguing that it was immune from prosecution under the Foreign Sovereign Immunities Act and that, even if not immune, it had not properly been served as required by the Foreign Sovereign Immunities Act.

The district court correctly ruled that it lacked personal jurisdiction over the Federal Republic under the Foreign Sovereign Immunity Act ("FSIA"), because petitioner did not establish subject-matter jurisdiction and because of the lack of proper service of process. *Gutch v. Federal Republic of Germany,* 444 F. Supp. 2d 1, 2 (D.D.C. 2006) (*citing Transaero, Inc., v. LaFuerza Aerea Boliviana*, 308 U.S. App. D.C. 86, 30 F.3d 148, 151 (D.C. Cir. 1994). The Court of Appeals for the

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[1] Facts set out in the district court's opinion are cited to Petitioner's Appendix B. The district court's opinion also may be found at *Gutch v. Federal Republic of Germany,* 444 F. Supp. 2d 1 (D.D.C. 2006).

District of Columbia Circuit affirmed the district court's ruling in its unpublished opinion.

II. Underlying Facts

Petitioner's deceased father, Dr. Kobre, was a United States citizen who served in the armed forces of the United States during World War II. At the conclusion of the war, he remained in Germany as a member of the allied occupation forces until 1955. He thereafter remained in Germany and practiced law. Dr. Kobre did not file German income tax returns for many years and understated his income tax liability on the German income tax returns he did file. German authorities tried Dr. Kobre in a German criminal court for tax evasion. Dr. Kobre claimed to have been a member of the Allied Forces, and that, as such, he should be immune from taxation by Germany or jurisdiction in German courts. The German criminal court in Berlin concluded, after extensive review of all the evidence presented and a seven day trial, that Dr. Kobre lost his status as member of the Allied Forces in 1955 and, like any other German resident, became subject to German taxes and to the jurisdiction of German courts. The court found Dr. Kobre guilty of income tax evasion for the period from 1957 to 1987 on February 23, 1989. Dr. Kobre never paid the income taxes and interest owed. Dr. Kobre died in November 1989 and the tax debt passed to the petitioner as an inheritance debt.[2] (Pet. App. B, p.6a-7a).

---

[2] German beneficiaries are treated as having received the property directly from the decedent. Section 1922 (1) German Civil Code. Under this concept of universal succession, which can be found in

Petitioner subsequently brought a civil suit in the Tax Court for Berlin, Germany to challenge the tax debt. The tax court ruled against the petitioner, reaffirming the criminal court's finding that Dr. Kobre's special status ended in 1955 and that Dr. Kobre was liable for German taxes. The German Federal Fiscal Court, the appellate tax court in Germany, dismissed the petitioner's subsequent appeal in 1994, finding no fault in the decision of the Berlin tax court. The German Constitutional Court, Germany's highest court and the court of last resort, declined to hear the case in 1996. (Pet. App. B, p. 7a). In 1999, the European Commission on Human Rights rejected the Petitioner's appeal. (Pet. App. B, p. 7a).

REASONS FOR DENYING THE WRIT

The decisions of the district court and the court of appeals that Germany has not waived its sovereign immunity by implication are correct and as there is no mature conflict in the courts of appeals over the standard for determining if such an implied waiver of immunity exists, this Court's review is not warranted. In addition, there is no dispute that Petitioner failed to properly serve process on the Federal Republic of Germany and therefore, even if Germany had waived its sovereign immunity, the district court still has no personal jurisdiction over Germany.

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many civil law jurisdictions, the property of the decedent and his debts vest immediately. Mr. Gutch could have disclaimed the inheritance and would have not been made liable for the tax liabilities incurred by his father. He failed to do so.

Petitioner argues that the Federal Republic of Germany has waived its immunity by implication by not stopping its attempt to collect taxes from petitioner due and owing to the Federal Republic of Germany under German tax law. These allegations, even if proven, do not form the basis for a finding that Germany has impliedly waived it sovereign immunity.

The history of FSIA suggests that implicit waivers are found only in cases where a foreign state has agreed to arbitration in another country, where a foreign state has agreed that the law of a particular country should govern a contract, or where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess., p. 18, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6617. None of these circumstances are present in this case.

The Supreme Court has directed that waivers of sovereign immunity are to be narrowly construed in favor of the sovereign. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-686 (1983), *citing McMahon v. United States*, 342 U.S. 25, 27 (1951), and *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686 (1927). Thus, it is no surprise that federal courts agree that the implicit waiver exception to FSIA can only be applied under these very narrowly defined circumstances. In fact, federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly. *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991) (citations omitted). A foreign sovereign has not waived its immunity

unless it does so clearly and unambiguously. *See*, *World Wide Minerals, LTD. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002); *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1292 (11th Cir. 1999); *Saudi Arabian Airlines Corp. v. Tamimi (In re Tamimi)*, 176 F.3d 274, 278 (4th Cir. 1999); *Rodriguez v. Transnave Inc.*, 8 F.3d 284, 287 (5th Cir. 1993); *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 378 (7th Cir. 1985) (per curiam).

Respondent Federal Republic of Germany has not waived its immunity by its effort in Germany to collect taxes due and owing to the Federal Republic of Germany against a German taxpayer and resident of Germany in accordance with the tax laws of the Federal Republic of Germany. These activities do not imply a waiver of sovereign immunity. On the contrary, enforcement of German tax laws by German tax authorities within the borders of the Federal Republic of Germany is clearly outside the implicit waiver exception envisioned by Congress and is not subject to the jurisdiction of courts in the United States.

Indeed, in the context of discussing the common law revenue rule, which stands for the proposition that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns, U.S. federal courts have stated that, "policy complications and embarrassment may follow when one nation's courts analyze the validity of

another nation's tax laws." *European Cmty. v. RJR Nabisco*, 424 F.3d 175, 180 (2d Cir. 2005).

Petitioner mailed the complaint and summons to the Embassy of the Federal Republic of Germany in Washington, D.C. on or about December 7, 2005. (Pet. App. B, 8a). This service attempt is invalid under the Foreign Sovereign Immunities Act[3] and pursuant to Fed R. Civ. P. 12(b)(5), which petitioner conceded below. (Pet. App. B, 23a). Petitioner asked the district court for leave to properly serve Germany. (Pet. App. B, 23a). The district court denied this request in light of its holding that the Federal Republic of Germany was entitled to sovereign immunity. (Pet. App. B, 24a). Since the Court lacks personal jurisdiction over the Federal Republic of Germany, it would be futile for the Court to hear this case, as the failure to properly serve the Federal Republic of Germany is a separate and independent basis for dismissal of the lawsuit.

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[3] The methods set forth in FSIA at 28 U.S.C. §1608(a) are the sole channels through which service may properly be effected on a foreign sovereign. *Transaero, Inc.*, 30 F.3d at 154 (*citing* H.R. Rep. No. 1487 at 24, reprinted in 1976 U.S.C.C.A.N. at 6623 (Section 1608(a) "sets forth the exclusive procedures for service on a foreign state.'))

CONCLUSION

Petitioner's claim is without merit, there is no conflict in appellate authority on the scope of the implicit waiver of sovereign immunity and petitioner has failed to properly serve Germany with process. Thus, the writ should be denied.

Respectfully submitted,

Jeffrey Harris
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